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AUG 19 1959
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 230

BERTRAND E. MOEBUS,

Petitioner,

against

PAUL TISHMAN CO., INC. and I. B. MILLER CONTRACTING CORP.,

Respondents,

HORN CONSTRUCTION CO.,

Respondent,

PAUL TISHMAN GENERAL CONTRACTOR, INC.,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT, HORN CONSTRUCTION CO. IN OPPOSITION

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Opinions Below

The opinions below are accurately set forth in the Petition.

Jurisdiction

Jurisdiction of this Court is invoked by the petitioner under 28 U.S.C. Sec. 1257(3). It is respectfully submitted that jurisdiction is improperly invoked because the highest State Court, in which a decision could be had in the instant case, is not the Court of Appeals of the State of New York, but the Appellate Division of the Supreme Court.

The judgment of reversal of the Appellate Division of the Supreme Court was entered in the office of the Clerk of Kings County, as required by New York practice, on February 18, 1958, more than ninety days before this petition was filed.

The Court of Appeals of the State of New York dismissed the appeal of petitioner herein for lack of jurisdiction to review a discretionary order of the Supreme Court, Appellate Division. This decision was based upon the limitation of the Court of Appeals to review questions of law (New York Civil Practice Act, Sec. 605). This limitation on the power of the Court of Appeals as applied to decisions such as the one here involved is of long standing and clearly expressed in the decisions of the Court of Appeals.

Mills v. *Davis*, 53 N. Y. 349 (1873);
Reif v. *Rutenberg*, 242 N. Y. 601 (1926);
Mitchell v. *City of Yonkers*, 255 N. Y. 633 (1931);
Trapani v. *Samuels*, 3 N. Y. 2d 931 (1957);
Feingold v. *City of New York*, 4 N. Y. 2d 783 (1958);
Quick Service Novelty Corp. v. *Scharf*, 4 N. Y. 2d 799 (1958).

Accordingly, certiorari should properly be to the Appellate Division of the Supreme Court of the State of New York, Second Department, and the time for petitioner to

petition for a writ of certioari began to run when the judgment of that Court was entered.

Largen v. *Texas*, 318 U. S. 418 (1943);
Parker v. *Illinois*, 333 U. S. 571 (1948).

This is a case in which review is discretionary and must be sought and denied as in *Woods* v. *Miersheiner*, 328 U. S. 214.

Moreover, it is respectfully submitted that jurisdiction is improperly invoked because petitioner herein failed to seasonably raise a constitutional question below. A constitutional question was never properly raised before any State Court. New York procedure requires that, to raise a constitutional question in the Court of Appeals, the question must be raised below.

City of New Rochelle v. *Gloster*, 296 N. Y. 509 (1946);
Rector etc. of the Church of the Holy Trinity v. *Melish*, 301 N. Y. 679 (1950);
Cf. Jongebloed v. *Erie R. Co.*, 296 N. Y. 912 (1942).

The petitioner herein further raised no constitutional objection to the relief demanded by the respondents herein either in the Trial Court, Special Term, or in the Appellate Division, and did not raise it even on the motion for reargument in the Appellate Division. In the Court of Appeals for the first time petitioner in his brief contended that the Appellate Division dismissal for lack of prosecution was violative of the Fifth Amendment of the Constitution of the United States. In extended oral argument, counsel for petitioner did not once raise this or any constitutional question. He seemed indeed to have abandoned the claim because, while the answering briefs pointed out that the Fifth Amendment to the Constitution was not applicable to State actions, no reply or supplemental brief

was ever served nor did petitioner's counsel make any attempt to correct this error. Accordingly, since the constitutional question was never properly raised in the Court below, it cannot be raised here on petition for a writ of certiorari.

Herndon v. *Georgia*, 295 U. S. 441 (1935).

Questions Presented

1. Was the petitioner deprived of property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, by the order of the Appellate Division reversing the Trial Court and dismissing petitioner's complaint for failure to diligently prosecute his action?

2. Was the petitioner deprived of his property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, by the action of the Court of Appeals in dismissing his appeal?

Statement of the Case

The petitioner herein instituted this action, which was one for personal injuries arising out of a construction accident, by service of process in or about November 1955 (fol. 27). Issue was joined by service of defendant's answer in or about March 1956 (fol. 27). Examinations before trial were conducted in August and September 1956 (fol. 46). Thereafter and until February 25, 1957, the plaintiff took no action toward placing this case on the calendar. On February 25, 1957, the plaintiff received a letter from John P. Smith, attorney for the defendants-respondents Paul Tishman Co., Inc. and I. B. Miller Contracting Corp., advising of the imminence of a motion to dismiss for lack of prosecution (fol. 29).

Thereafter the plaintiff delayed four months in filing a note of issue and did not file same until they were in receipt of a motion to dismiss for lack of prosecution (fol. 29). The excuse offered by the plaintiff's attorney in his affidavit in opposition to the motion to dismiss for lack of prosecution was that it took four months following February 1957 to secure information necessary for the preparation of papers to satisfy the requirements of Rule 9 and that he is a very busy practitioner (fol. 47). No excuse was offered for the period between August and September of 1956 and February of 1957.

On June 26, 1957, defendants-respondents, Tishman and Miller, moved to dismiss the instant action for failure to prosecute, in which motion the defendant-respondent, Horn Construction Co., joined. On July 24, 1957, the return date of the motion, Mr. Justice Crane denied the motion to dismiss (fols. 13-17). Defendants-respondents, Tishman and Miller, appealed to the Appellate Division of the Second Department, which Court reversed the decision below and ordered that the complaint herein be dismissed for lack of prosecution (fols. 61-66), following which a judgment, pursuant to said order, was entered (fols. 67-72). In its decision, the Appellate Division pointed out that no affidavit of merits by the plaintiff had been submitted at Special Term and that no excuse for the delay in noticing the case for trial had been offered.

Following the entry of the order, petitioner moved by order to show cause for reargument of the appeal in the Appellate Division, submitting with that motion, for the first time, an affidavit by the plaintiff, petitioner herein, setting forth, in accordance with the established practice in New York, a brief description of the accident, showing that there was some merit to his contentions and a statement to the effect that it was his intention to pursue the action to completion. Also submitted on the motion for reargument was an affidavit by Joseph Dean Edwards, the attorney for the plaintiff, petitioner herein, setting

forth in detail some of the difficulties which he contended had caused the delay in filing a note of issue. The motion for reargument was denied and the plaintiff, petitioner herein, appealed to the Court of Appeals. The Court of Appeals, in an order entered in the office of the Clerk of the Court of Appeals on February 26, 1959, dismissed the appeal on the ground that it involved a non-reviewable exercise of discretion.

ARGUMENT

The Decision Below is Clearly Correct

The Appellate Division did not abuse its discretion in dismissing the complaint of the plaintiff, petitioner herein, for failure to diligently prosecute his action. The respondents herein moved at Special Term on July 24, 1957, pursuant to Section 181 of the Civil Practice Act and Rule 156 of the Rules of Civil Practice, for an order dismissing the complaint for failure on the part of the plaintiff to diligently prosecute. At this time, approximately sixteen months had passed since joinder of issue and ten months since the completion of examinations before trial. Counsel for the plaintiff, petitioner herein, in his affidavit in opposition to said motion, offered as an excuse for this delay only that it took him four months of this time to acquire some information which he needed in order to comply with Rule 9 of the Rules of the Supreme Court, Kings County. No excuse at all was offered for the more than five months delay following completion of examinations before trial prior to receipt of a letter from the attorney for the respondent Paul Tishman Co., Inc. of his intention to move for a dismissal of the complaint unless the case was placed upon the calendar. No affidavit of merits by the plaintiff was submitted. Nevertheless the Trial Judge denied the motion.

The Appellate Division, in the exercise of its discretion as conferred by Section 181 of the Civil Practice Act and

Rule 156 of the Rules of Civil Practice, reversed the order of the Trial Judge and ordered the complaint dismissed on the grounds as indicated in its opinion, that the plaintiff had failed to submit an affidavit of merits and had failed to satisfactorily explain or excuse the delay in noticing the case for trial. In arriving at its decision, the Appellate Division acted within the exercise of its powers to review an exercise of discretion by the subordinate division of the Supreme Court and, in doing so, to exercise its own independent discretion.

Pietrarola v. *N.J.H.R.R. & F. Co.*, 197 N. Y. 434 (1910);
Rugg v. *State*, 278 App. Div. 216, 104 N.Y.S. 2d 633 (Third Dept. 1951).

In *Pietrarola* v. *N.J.H.R.R. & F. Co., supra,* the Court said, in referring to the powers of the Appellate Division: "Its powers of discretion comprehend the right to review an exercise of discretion by the inferior Courts and equally the right to exercise its own discretion independently where the facts or circumstances of the case are such as to justify it."

The decision was in accordance with previously indicated standards of the Appellate Division, requiring the showing by the plaintiff that the action is meritorious and the showing by counsel that he has diligently attempted to prosecute the action toward trial. Excuses that the plaintiff's attorney was a busy practitioner or that the file had been misplaced or other similar excuses had never been considered sufficient.

Moshman v. *City of New York*, 3 App. Div. 2d 822, 160 N.Y.S. 2d 977 (First Dept. 1957);
A. R. Hyde & Sons v. *Roller Derby Skate Co.*, 1 App. Div. 2d 942, 150 N.Y.S. 2d 325 (First Dept. 1956).

An affidavit of merits has always been required, e.g.:

O'Rourke v. *City of New York*, 3 App. Div. 2d 713, 159 N.Y.S. 2d 366 (Second Dept. 1957);
Brassner Mfg. Co. v. *Consolidated Edison Co.*, 1 App. Div. 2d 840, 148 N.Y.S. 2d 782 (Second Dept. 1956);
Fast v. *Meenan Oil Co.*, 1 App. Div. 2d 889, 149 N.Y.S. 2d 332 (Second Dept. 1956).

The Appellate Division has properly held that it was an abuse of the Trial Judge's discretion to deny the respondents' motions to dismiss, even though a note of issue had been served following the receipt of a notice of motion. The fact that the Trial Judge, upon hearing that the case had been noticed for trial, regarded this point as conclusive and did not hear further argument, in no way deprived the petitioner of due process. The requirements of statements made under oath, showing both a meritorious action and diligent prosecution, in order to defeat a motion made pursuant to Rule 156, could have in no way been met by further oral argument. In any event, due process does not require oral argument. Long usage has established the practice, particularly in a busy Motion Part, of Judges not hearing full oral argument that counsel may wish to offer and all Courts put time limitations on counsel's oral argument. Counsel knew or should have known what papers were necessary. His failure to prepare them is a mere error on his part and in no way reflects on the procedure of the Courts of the State of New York, which was in accordance with long established practice.

The refusal of the Appellate Division to grant reargument and accept evidence not presented to the Trial Court below, was also proper and in accordance with long established practice.

Clark v. *Stannard*, 286 App. Div. 953, 143 N.Y.S. 2d 96 (Fourth Dept. 1955);

New York Cable Co. v. City of New York, 104 N. Y. 1 (1887);
People ex rel. Dady v. *Supervisor of 31st Ward*, 91 Hun 206, 36 N.Y.S. 348 (Second Dept. 1895).

Moreover, even the affidavits presented by counsel on the motion for reargument in the Appellate Division raised no constitutional question. It is clear that the Courts may, in the interest of speedy litigation, avoiding congestion of the calendar, dismiss stale claims.

Hirsch v. *Goldstein*, 265 Mass. 358.

In view of the fact that even the additional affidavit offered no excuse for the delay of counsel between September of 1956 and January of 1957 and between January of 1957 and July of 1957, and in view of the fact that the additional affidavit set forth between January of 1957 and July of 1957 two or three letters and a telephone call or two in over five months, the Court, in its discretion, need not have found sufficient excuse established.

Petitioner argues that the Appellate Division did not exercise its discretion but rather applied a fixed rule of law. The interplay of rule and discretion is an interesting area of jurisprudence. The mere fact that, with the establishment of precedents, standards are established as guide posts to the exercise of discretion does not mean that a Court has not exercised judgment.

See

Cardozo, Paradox of Legal Science, Chapter 1;
Pound, Justice According to Law, 13 Col. L. Rev. 696 (1913).

No Important Federal Question is Presented

Petitioner herein makes no attack on Rule 156 generally. He claims merely that in a particular case, involving a

particular litigant in a personal injury action, the Court of the State of New York failed to pay proper heed to the excuse of his attorneys for failing to comply with Rule 156 of the Rules of Civil Practice. This claim is made in a case in which these excuses were not fully, or even impliedly, set forth before the Trial Judge. This is a case which at best devolves around its own particular facts of misunderstanding and wherein petitioner had ample notice and a full opportunity to be heard by an impartial tribunal. No question is raised involving the rights of litigants in the State of New York generally.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Horn Construction Co.